IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

Phil Bredesen, Appellee, v. Tennessee Judicial Selection Commission, Appellee, and Intervenors Houston Gordon and George T. Lewis, Appellants.	)	Appeal No. M2006-02722-SC-RDM-CV

BRIEF OF APPELLEE PHIL BREDESEN

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[Oral Argument Requested]

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STATEMENT OF ISSUES

1. Whether the trial court correctly construed the relevant provisions of Tenn. Code Ann. §§ 17-4-109 and 17-4-112(a) of the Tennessee Plan?

2. Whether the trial court correctly found that the Tennessee Human Rights Act, Tenn. Code Ann. §§ 4-21-101, *et seq.*, is inapplicable to the Governor's appointment to fill a vacancy on the Tennessee Supreme Court under the Tennessee Plan?

3. Whether the trial court correctly found that the Intervenors failed to state a cause of action that the Governor's rejection of the first panel of nominees violated the Equal Protection Clause of the United States Constitution?

STATEMENT OF THE CASE

This action was brought by the Governor of the State of Tennessee pursuant to the Tennessee Declaratory Judgment Act to determine his rights and legal duties in making appointments to fill existing vacancies in the Tennessee Supreme Court under the Tennessee Plan, Tenn. Code Ann. §§ 17-4-101, *et seq*. In particular, the Governor sought a determination as to the appropriate construction of the provisions of Tenn. Code Ann. § 17-4-112 and their effect upon the rights, status and legal relations of the Governor and the Tennessee Judicial Selection Commission.

The Governor filed his complaint for declaratory judgment against the Tennessee Judicial Selection Commission ("Commission") on September 18, 2006.[1] The complaint sought an order declaring: (1) that Tenn. Code Ann. § 17-4-112(a) of the Tennessee Plan requires that the Judicial Selection Commission, upon rejection by the Governor of the three nominees contained in the first panel, submit a second panel that contains three new nominees and does not include any of the nominees from the rejected panel; (2) that the second panel of nominees submitted by the Commission on September 7, 2006, is not a validly constituted panel as it contains the name of a rejected nominee from the first panel; and (3) that the Governor has no legal duty to make any appointment to fill the current vacancy in the Supreme Court unless and until the Commission submits a panel that is validly constituted in accordance with the Tenn. Code Ann. § 17-4-112(a).[2]

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[1]TR Vol. 1 at 1-17.

[2]*Id*. at 9.

On November 6, 2006, the Governor and the Commission entered into an agreed order setting a hearing on any motions for summary judgment for Wednesday, December 13, 2006.[3] Subsequently, on November 14, 2006, the Commission filed its answer in which it did not dispute any material facts but did raise several affirmative defenses, including the argument that the Governor's rejection of the first panel of nominees was invalid because it was based exclusively on considerations of race, gender or other considerations prohibited by various statutes and constitutional provisions.[4]

On November 15, 2006, the Governor filed his motion for summary judgment.[5] Approximately two weeks later on November 27, 2006, Intervenor J. Houston Gordon ("Gordon") filed a motion to intervene. Gordon asserted that upon becoming certified as a nominee by the Commission, he became vested with a personal right to be considered by the Governor for appointment to the Supreme Court and that the procedure followed after Chancellor Dinkin's withdrawal did not comply with the statutory requirements of Tenn. Code Ann. §§ 17-4-109 and 17-4-112(a).[6] He further asserted that he was a necessary party because the effect of the relief sought by the Governor would result in a denial of his vested right to be considered for appointment to the Supreme Court.[7]

Along with his motion to intervene, Gordon filed his answer as required by Tenn.R.Civ.P. 24, as well as a counter-complaint against the Governor and a cross-complaint

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[3]TR Vol. 1 at 20-21.

[4]TR Vol. 1 at 22-26.

[5]TR Vol. 1 at 27-31.

[6]TR Vol. 1 at 41-49.

[7]*Id.* at 47.

against the Commission.[8] Gordon sought an order declaring that "the mandatory procedures of T.C.A. §§ 17-4-109(e) and 112(a) require that, before the Governor is authorized to consider, act upon, reject, or appoint, he must have before him a complete and fully constitute panel of three (3) persons selected and certified by the Judicial Selection Commissin under T.C.A. § 17-4-109(e)."[9] Gordon further requested that the trial court correct the defect in procedure resulting from Chancellor Dinkins' withdrawal either by returning the incomplete panel to the Commission for completion or by declaring him to be a properly certified court nominee for consideration for appointment to the Supreme Court pursuant to T.C.A. § 17-4-112(a)-(f).[10]

On November 29, 2006, Intervenor George T. Lewis ("Lewis") also filed a motion to intervene.[11] On November 30, 2006, the trial court issued an order declaring that, after reviewing the motions to intervene, it had determined "that it can do justice to the motions but continue to expedite the proceedings in this matter by not conducting oral argument on the motions and, instead, deciding them on the papers."[12] Accordingly, the court ordered the Governor and the Commission to file responses to the motions to intervene by noon on December 4, and any replies were to be filed by 4:00 p.m. on December 5, 2006.[13]

Both the Governor and the Commission were willing to agree to intervention by Messrs. Gordon and Lewis upon the condition that such intervention would not delay the final hearing on

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[8]TR Vol. 1 at 51-78.

[9]*Id*. at 75.

[10]*Id*. at 77.

[11]TR Vol. 1 at 89-90.

[12]TR Vol. at 91-92.

[13]*Id*. at 92.

December 13. Mr. Lewis was agreeable to this condition and an agreed order allowing Mr. Lewis' intervention was entered on December 8, 2006.[14] Mr. Gordon, however, was not agreeable to this condition. Accordingly, the Governor objected to Mr. Gordon's intervention on the basis that it was untimely and unnecessary.[15] The Governor further objected to Mr. Gordon's motion to intervene as an attempt unnecessarily to delay the proceedings, noting that while all the other parties had agreed that there were no material facts in dispute, Mr. Gordon had taken a contrary position and sought to delay the December 13 hearing unless and until he received satisfactory responses to the 136 requests for admission he had served upon the Governor and the Commission on November 28, 2006.[16]

On December 6, 2006, the trial court issued a memorandum and order granting Gordon's motion to intervene, but declining to continue the hearing on December 13.[17] Instead, the court established a briefing schedule for the parties and ordered counsel to address the following legal issues concerning the proper construction and interpretation of the statute and its scope:

> 1. Statutory Construction and Interpretation — Is it a statutory precondition to the Governor's right of selection or rejection of the first panel that he must have three nominees, certified by the Commission, who are willing to serve? That is, where three persons are certified by the Commission as nominees to the Governor and one withdraws, does the wording of Tennessee Code Annotated section 17-4-112(a), "shall fill the vacancy by appointing one of the three (3) persons nominated by the judicial selection commission [emphasis added]," require, so as to maintain

[14]TR Vol. II at 166-67.

[15]TR Vol. 1 at 95-128

[16]*Id*. at 107-128.

[17]TR Vol. II at 148-156.

the number of nominees as three as stated in the statute, that the Commission send another nominee to the Governor before the Governor is permitted by the statute to exercise his selection or rejection of the first panel? And, if so, what are the implications and remedies for the facts of this case?

2. Statutory Construction and Interpretation — By requiring the Governor to state in writing his reasons for rejection, does the statute limit and subject that rejection to review by the Commission, for its lawfulness and validity?

3. Scope of the Statute — Does the Tennesee Human Rights Act or Title VII apply where the Governor is exercising his statutory authority to fill a vacancy under the Tennessee Plan?

* * *

4. Whether, upon rejection of the first panel of three nominees by the Governor in this case, Tennessee Code Annotated section 17-4-112(a) required the Commission to submit a second panel that does not include one or more of the rejected nominees of the first panel, but, instead, includes three new nominees?[18]

On December 5, the Commission filed its motion for summary judgment.[19] On December 8, 2006, Mr. Lewis filed his answer and counter-claim asserting that the Governor's rejection of the first panel (Gordon and Lewis) violated the Equal Protection Clause of the United States Constitution, as well as the Tennessee Human Rights Act, Title VII, and the Governmental Employee Rights Act of 1991.[20] Mr. Lewis also filed his motion for summary judgment that same day.[21]

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[18]TR Vol. II at 153-54.

[19]TR Vol. I at 140-144.

[20]TR Vol. II at 157-159

[21]TR Vol. II at 160-165.

On December 12, 2006, the Governor filed his response to the motions for summary judgment filed by the Commission and the Intervenors Gordon and Lewis.[22] Oral argument was heard on the motions for summary judgment on December 13, 2006. On December 14, 2006, the trial court issued a memorandum and order finding that summary judgment was appropriate and that the Governor prevailed on all issues.[23] Specifically, the court found that

> the plain wording of the statute is that the second panel must consist of three persons each different from the first panel; neither Title VII of the Civil Rights Act nor the Tennessee Human Rights Act apply to this case, and the facts do not establish that the Intervenors, as a consequence of their race, were denied equal protection of the law; and the wording of the statute is that the condition precedent which must be fulfilled before the Governor can exercise his right to select or reject is that the Commission certify three qualified nominees, which occurred in this case, their willingness to serve being designated by the statute as an aspiration for the Commission but not a condition precedent.[24]

The court further found that the Governor's rejection of the first panel was validly exercised and that the second panel submitted to the Governor by the Commission was not properly constituted because it contained the name of one of the nominees validly rejected by the Governor on the first panel.[25] Accordingly, the court ordered the Commission to remove Mr. Gordon's name from the list of nominees on the second panel and to select a third nominee from the application pool already collected and to certify and add to and complete the second panel pending before the Governor.[26]

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[22]TR Vol. II at 179-201.

[23]TR Vol. II at 231-249.

[24]*Id*. at 234.

[25]*Id*.

[26]*Id*.

On December 22, 2006, the Intervenors Gordon and Lewis both filed notices of appeal and motion for stay pending appeal.[27] On January 2, 2007, the trial court issued an order denying the request for a stay, finding that the claims and arguments of the Intervenors are less likely to succeed as a matter of law on appeal that the decision of the court and, therefore, a stay would only further delay the selection process to fill the Supreme Court vacancy.[28]

Intervenors Gordon and Lewis also filed motions on December 22 requesting that this Court assume jurisdiction of the appeal pursuant to Tenn. Code Ann. § 16-3-201(d). On December 28, the Governor filed a response in which he concurred with the request that this Court exercise its discretion to assume jurisdiction because of the compelling public interest in the swift resolution of the appeal. On January 3, 2007, this Court entered an order granting the motion to assume jurisdiction and setting an expedited briefing schedule and hearing date.

[27]TR Vol. II at 251-257, 259-260.

[28]TR Vol. II at 264-266.

STATEMENT OF FACTS

The Tennessee Plan

In 1994, the Tennessee General Assembly adopted Public Chapter 942 establishing the "Tennessee Plan" for the selection, evaluation and retention election of appellate judges. That Act, which is codified at Tenn. Code Ann. §§ 17-4-101, *et seq*., states:

> [i]t is the declared purpose and intent of the general assembly by the passage of this chapter to assist the governor in finding and appointing the best qualified persons available for service on the appellate courts of Tennessee, and to assist the electorate of Tennessee to elect the best qualified persons; to insulate the judges of the courts from political influence and pressure; to improve the administration of justice; to enhance the prestige of and respect for the courts by eliminating the necessity of political activities by appellate justices and judges; and to make the courts "nonpolitical."

Under the Tennessee Plan, both the Governor and the Judicial Selection Commission play a role in the filling of vacancies on the appellate courts, including the supreme court. Specifically, the Plan provides that "[w]hen a vacancy occurs after September 1, 1994, in the supreme court, the judicial selection commission shall, at the earliest practicable date, hold a public meeting in Nashville." The Plan further provides that if the Commission is reliably informed that a vacancy is impending for another reason, then this public meeting may be held prior to actual occurrence of the vacancy.[29]

With respect to the public meeting, the Plan provides that "[a]ny member of the public, both lay and attorney, shall be entitled to attend the meeting and express orally or in writing suggestions of possible nominees and/or such citizen's approval of or objections to any suggested nominee for the judicial vacancy. Any licensed attorney may appear and make a

[29]Tenn. Code Ann. § 17-4-109(a)(2).

statement, oral or written, in support of such attorney's own nomination."[30] The Commission is then charged with making an independent investigation and inquiry to determine the qualifications of possible nominees for a supreme court vacancy and is authorized to hold as many private or public meetings as it deems necessary to accomplish this task.[31]

The Plan requires that the Commission "by a majority vote shall select three (3) persons and certify the names of the three (3) persons to the governor as nominees for the judicial vacancy" but, in doing so, is required to comply with the requirements of Art. VI, § 2 of the Tennessee Constitution, which states that no more than two of the five justices shall reside in any one of the grand divisions of the State.[32] Upon certification to the Governor of the names of three nominees for a supreme court vacancy, the Plan then provides that

> the governor shall fill the vacancy by appointing one (1) of the three (3) persons nominated by the judicial selection commission, or the governor may require the commission to submit one (1) other panel of three (3) nominees. If the governor rejects the first panel of nominees, the governor shall select one (1) of the nominees in the second panel. If the governor rejects the first panel, the governor shall state in writing for the judicial selection commission the reasons for rejection of the panel.[33]

[30]Tenn. Code Ann. § 17-4-109(c).

[31]Tenn. Code Ann. § 17-4-109(d).

[32]Tenn. Code Ann. § 17-4-109(e) and (f).

[33]Tenn. Code Ann. § 17-4-112(a).

Supreme Court Vacancy

In early 2006, Justices E. Riley Anderson and Adolpho A. Birch, Jr., announced their retirements from the Supreme Court, effective August 31, 2006, thereby creating vacancies in those judicial offices as of that date. One of the vacancies was subsequently filled by the appointment of the former Presiding Judge of the Court of Criminal Appeals, Judge Gary Wade, in accordance with the provisions of Tenn. Code Ann. §§ 17-4-109 and 112 of the Tennessee Plan.[34]

Thereafter, in accordance with Tenn. Code Ann. § 17-4-109(a) and (e), the Commission announced that it would accept applications for nomination to fill the remaining vacancy on the Supreme Court. Nine individuals timely submitted applications and appeared before the Commission for consideration for the remaining vacancy, and on July 18, 2006, the Commission certified by letter to the Governor the names of three nominees to fill the vacancy on the Supreme Court pursuant to Tenn. Code Ann. § 17-4-109(e). The three nominees were: Richard H. Dinkins, J. Houston Gordon and George T. "Buck" Lewis.[35]

Subsequently, by letter dated July 24, 2006, one of the nominees, Richard Dinkins, notified the Governor that he was withdrawing his name from consideration for appointment to the Tennessee Supreme Court.[36] Thereafter, the Governor notified the Commission by letter that he was rejecting the panel of three nominees and requesting a new panel of nominees pursuant to Tenn. Code Ann. § 17-4-112(a). Specifically, the Governor stated:

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[34]TR Vol. 1 at 4, 22 and 29.

[35]TR Vol. 1 at 4,5, 22, 29.

[36]TR Vol. 1 at 5, 12, 22, 29.

> I am writing to return to the Judicial Selection Commission the panel of nominees certified to me last week for the vacancy on the Tennessee Supreme Court. I have received a letter from Chancellor Richard Dinkins withdrawing his name as one of the three nominees, and therefore, I am requesting pursuant to Tenn. Code Ann. § 17-4-112(a) that the Commission submit a new panel of nominees.[37]

The Governor further requested that the Commission send a "new panel of nominees that includes qualified minority candidates" and that it select the new panel as expeditiously as possible so that the appointment could be made before September 1, when the vacancy would occur.[38]

On August 8, 2006, the Commission held a special meeting and voted to request that the Governor clarify, in writing, "if he intended to reject the entire panel in his July 24, 2006, letter, and if so, his reasons for rejecting the panel."[39] On August 10, 2006, the Governor responded in writing to the Commission, stating that by invoking Tenn. Code Ann. § 17-4-112(a), he was rejecting the first panel of nominees for the reasons stated in his previous letter.[40]

On August 22, 2006, the Commission met and announced a new deadline of August 29, 2006, for submission of applications for nomination.[41] In addition, the Commission met and adopted a resolution by a vote of 8-7 to allow applications from the rejected nominees from the first panel to be considered for the second panel. The Commission further resolved that all

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[37]TR Vol. 1 at 5, 13, 23, 30.

[38]*Id.*

[39]TR Vol. 1 at 5, 14, 23.

[40]TR Vol. 1 at 6, 15, 23, 30.

[41]TR Vol. 1 at 6, 23.

applicants would be considered unless an applicant affirmatively directed the Commission not to consider them.[42] Seventeen individuals timely qualified for consideration by the Commission.[43]

Subsequently, on September 5, 2006, the Commission met and selected D'Army Bailey, J. Houston Gordon and William C. Koch as the three nominees to fill the vacancy on the Supreme Court. These three nominees were subsequently certified to the Governor by letter dated September 7, 2006.[44] J. Houston Gordon was one of the three nominees on the first panel that was rejected by the Governor pursuant to § 17-4-112(a).

[42]TR Vol. 1 at 6, 16, 23.

[43]TR Vol. 1 at 6, 23.

[44]TR Vol. 1 at 6, 17, 23, 30.

ARGUMENT

I. The Trial Court Correctly Construed Tenn. Code Ann. § 17-4-109(e) and § 17-4-112(a).

Although he raised a number of issues below, the only issue Intervenor Gordon has raised on appeal is with respect to the trial court's finding that the withdrawal of a nominee after certification by the Commission does not nullify or invalidate the first panel of nominees.[45] Mr. Gordon argues that under the statutory scheme established by the Tennessee Plan, the Governor must have three nominees who "are qualified and available to serve" before he can act and that the withdrawal of Chancellor Dinkins created a "procedural defect" in the process that rendered any actions thereafter null and void. Accordingly, Mr. Gordon argues that the Tennessee Plan should be construed as providing that when a nominee certified pursuant to Tenn. Code Ann. § 17-4-109(e) thereafter becomes unavailable or disqualified, the Commission should replace that nominee so that three nominees who are "qualified and available for service" are submitted to the Governor. The trial court correctly found that such an interpretation is simply not supported by the language of the Tennessee Plan.

The most fundamental rule of statutory construction is that the intention of the legislature must prevail.[46] Thus, courts must ascertain and then give the fullest possible effect to the

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[45]Neither Gordon nor Lewis has challenged the trial court's finding with respect to the original issue raised by the Governor in his complaint, *i.e.*, that upon rejection of a first panel of nominees, Tenn. Code Ann. § 17-4-112(a) requires the Commission to submit a second panel of three new nominees that does not contain any of the nominees from the rejected first panel.

[46]*McGee v. Best*, 106 S.W.3d 48, 64 (Tenn.Ct.App.), *p.t.a. denied* (2002) ("The rule of statutory construction to which all others must yield is that the intention of the legislature must prevail."). *See also Southern v. Beeler*, 183 Tenn. 272, 195 S.W.2d 857 (1946); *Mangrum v. Owens*, 917 S.W.2d 244, 246 (Tenn.Ct.App. 1995); *City of Humboldt v. Morris*, 579 S.W.2d 860, 863 (Tenn.Ct.App. 1978).

General Assembly's purpose in enacting a statute as reflected in the statute's language.[47] Furthermore, this Court has held that, when the language of a statute is clear and unambiguous, the courts must interpret the statute as written,[48] rather than using the tools of construction to give the statute another meaning.[49]

Generally, the search for a statute's meaning should begin with the words of the statute itself.[50] The courts must give these words their natural and ordinary meaning unless the context in which they are used requires otherwise.[51] Further, because words are known by the company they keep,[52] courts should construe a statute's words in the context of the entire statute and in light of the statute's general purpose. Thus, courts should look to the statutory scheme in which the statute appears,[53] as well as the "subject matter [of the statute], the object and reach of the statute, the wrong or evil which it seeks to remedy or prevent and the purpose sought to be accomplished in its enactment" in ascertaining the legislature's intent.[54]

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[47]*Jones v. Garrett*, 92 S.W.3d 835, 839 (Tenn. 2002); *Robinson v. LeCorps*, 83 S.W.3d 718, 722 (Tenn. 2002).

[48]*Kradel v. Piper Indus., Inc.*, 60 S.W.3d 744, 749 (Tenn. 2001); *ATS Southeast, Inc. v. Carrier Corp.*, 18 S.W.3d 626, 629-30 (Tenn. 2000); *Lavin v. Johnson*, 16 S.W.3d 362, 365 (Tenn. 2000).

[49]*Limbaugh v. Coffee Med. Ctr.*, 59 S.W.3d 73, 83 (Tenn. 2001); *Gleaves v. Checker Cab Transit Corp.*, 15 S.W.3d 799, 803 (Tenn. 2000).

[50]*Blankenship v. Estate of Bain*, 5 S.W.3d 647, 651 (Tenn. 1999); *Freedom Broadcasting of Tenn., Inc. v. Tennessee Dep't of Revenue*, 83 S.W.3d 776, 781 (Tenn. Ct. App. 2002).

[51]*Nashville Golf & Athletic Club v. Huddleston*, 837 S.W.2d 49, 53 (Tenn. 1992); *Lockheed Martin Energy Sys. v. Johnson*, 78 S.W.3d 918, 923 (Tenn.Ct.App. 2002).

[52]*State ex rel. Comm'r of Transport. v. Medicine Bird Black Bear White Eagle*, 63 S.W.3d 734, 754-55 (Tenn.Ct.App. 2001).

[53]*State v. Walls*, 62 S.W.3d 119, 121 (Tenn. 2001); *State v. McKnight*, 51 S.W.3d 559, 566 (Tenn. 2001).

[54]*Lavin v. Jordan*, 16 S.W.3d at 366 (citing *State v. Lewis*, 958 S.W.2d 736, 739 (Tenn. 1997)).

The relevant language of the Tennessee Plan setting forth the duties and responsibilities of the Governor and the Commission is found in Tenn. Code Ann. § 17-4-109 and § 17-4-112. Tenn. Code Ann. §§ 17-4-109(d) and (e), which sets out the duties of the Commission, provide as follows:

> (d) After one (1) public hearing, the commission may hold such additional private or public meetings as it deems necessary. ***The commission*** shall make independent investigation and inquiry to determine the qualifications of possible nominees for the judicial vacancy and ***shall endeavor to encourage qualified attorneys to accept nomination*** and agree to serve if appointed to the judicial vacancy.
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> (e) As soon as practicable and not later than sixty (60) days from receipt of written notice from the governor that a vacancy has occurred, ***the commission***, in public or private meeting, by a majority vote ***shall select three (3) persons whom the commission deems best qualified and available to fill the vacancy and certify the names of the three (3) persons to the governor as nominees for the judicial vacancy.*** However, if an incumbent judge fails to file a writen declaration of candidacy as required by § 17-4-114 or § 17-4-115, or if the commission is reliably informed that a vacancy is impending for another reason, then the commission may meet, select such persons and certify the names of such nominees to the governor prior to actual receipt of written notice from the governor that a vacancy has occurred. (Emphasis added).

Tenn. Code Ann. § 17-4-112(a) provides for the duties of the Governor as follows:

> (a) When a vacancy occurs in the office of an appellate court after September 1, 1994, by death, resignation or otherwise, ***the governor shall fill the vacancy by appointing one (1) of the three (3) persons nominated by the judicial selection commission***, or the governor may require the commission to submit one (1) other panel of three (3) nominees. If the governor rejects the first panel of nominees, the governor shall select one (1) of the nominees in the second panel. If the governor rejects the first panel, the governor shall state in writing for the judicial selection commission the reasons for rejection of the panel. (Emphasis added).

It is undisputed that on July 18, 2006, the Judicial Selection Commission certified to the Governor the names of three persons to fill the vacancy on the Tennessee Supreme Court, namely, Chancellor Dinkins, Mr. Gordon and Mr. Lewis. Thus, as of July 18, the Commission had fully executed its statutory duty to "select three (3) persons whom the commission deems best qualified and available to fill the vacancy and certify the names of the three (3) persons to the governor as nominees."[55] The Tennessee Plan contains no provision that authorizes the Commission to make a fourth, fifth, or even sixth nomination to fill a judicial vacancy if it later turns out that one or more of its three nominees are unwilling or unable to serve if appointed. On the contrary, the plain terms of Tenn. Code Ann. § 17-4-109(e) empower the Commission to certify the names of three, and only three, persons to the Governor on any given panel of nominees. Once it has done so, the Commission has no further role to play in the appointment process unless and until the Governor exercises his power to reject under Tenn. Code Ann. § 17-4-112(a).

Likewise, the Tennessee Plan contains no provision that may be read to authorize any one of the three nominees, after the certification of his name to the Governor, to "un-nominate" himself and thereby, as Mr. Gordon argues, authorize the Commission to make another nomination. The statute scheme vests the power of nomination exclusively in the hands of the Judicial Selection Commission,[56] just as it vests the power to reject a panel of nominees exclusively in the hands of the Governor.[57] The General Assembly did not grant any authority to

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[55]Tenn. Code Ann. § 17-4-109(e).

[56]*Id.*

[57]Tenn. Code Ann. § 17-4-112(a).

the nominees themselves to share the nomination and rejection powers accorded by the statute to the Commission and Governor, respectively.

These observations concerning what does and what does not appear in the statutory text compel the following conclusion: There was nothing "incomplete" or "defective" about the July panel of nominees certified to the Governor by the Commission either before or after Chancellor Dinkins notified the Governor that he no longer wished to be considered for appointment. That panel contained the names of three nominees who had been certified by the Commission as "best qualified and available to serve" as required by Tenn. Code Ann. § 17-4-109(e) when submitted to the Governor on July 18. And there remained three nominees of the Commission, including Chancellor Dinkins, even after the Chancellor delivered his letter to the Governor on July 24. Under the plain terms of the statute, it is the Commission's certification — not the nominees' continuing availability — that fixes the identity of the three persons from whom the Governor may choose to make an appointment. Similarly, it is the Commission's certification and not the continued availability of the nominees that triggers into existence the Governor's option under Tenn. Code Ann. § 17-4-112(a) either to appoint one of those three persons or to reject the panel as a whole. Thus, the unilateral action of one of the three nominees after certification cannot under any plausible reading of the statute void the legality of the Commission's prior certification or limit the scope of authority conferred upon the Governor by Tenn. Code Ann. § 17-4-112(a).

Accordingly, the trial court correctly determined that the availability of a nominee once certified by the Commission pursuant to Tenn. Code Ann. § 17-4-109(e) is not a condition precedent to the Governor's exercising his right of selection or rejection and, therefore,

Chancellor Dinkins' request that he be withdrawn from consideration did not nullify or render the first panel illegal.

II. The Trial Court Correctly Found That The Tennessee Human Rights Act Does Not Apply To Gubernatorial Appointments To Fill Vacancies On The Tennessee Supreme Court.

Intervenor Lewis contends that the trial court erred in finding that the the Tennessee Human Rights Act ("THRA") was not applicable to the gubernatorial appointments to fill vacancies on the Tennessee Supreme Court. In making its finding, the trial court followed the "black-letter principle . . . that the THRA shall be construed and applied consistent with Title VII [of the Civil Rights Act of 1964]" and concluded that it was appropriate to adopt the definition of "employee" found in Title VII, which specifically excludes elected public officials and policy level appointees.

On appeal, Lewis focuses primarily on the trial court's adoption of the federal definition of "employee" and argues that this decision was in error and inconsistent both with the language and purpose of the THRA. In doing so, however, Lewis ignores one fundamental aspect of the THRA and that is that the employment discrimination protections of the THRA (as well as Title VII) protect only employment relationships. Here, the Governor's appointment to fill a vacancy on the Tennessee Supreme Court under the Tennessee Plan simply does not constitute an employment decision under either federal case law or Tennessee common law.

The Tennessee Human Rights Act specifically states that its purpose and intent is to:

> (1) ***Provide for execution within Tennessee of the policies embodied in the federal Civil Rights Act of 1964, 1968 and 1972, and Pregnancy Amendment of 1978, and the Age Discrimination in Employment Act of 1967***, as amended;

> (2) ***Assure that Tennessee has appropriate legislation prohibiting discrimination in employment***, public accomodations and housing sufficient ***to justify the deferral of cases by the federal equal employment opportunity commission***, the department of housing and urban development, the secretary of labor and the department of justice under those statutes;
>
> (3) ***Safeguard all individuals within the state from discrimination*** because of race, creed, color, religion, sex, age or national origin ***in connection with employment*** and public accomodations, and because of race, color, creed, religion, sex or national origin in connection with housing;
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> (4) Protect their interest in personal dignity and freedom from humiliation;
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> (5) Make available to the state their full productive capacity ***in employment***;
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> (6) Secure the state against domestric strife and unrest that would menace its democratic institutions;
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> (7) Preserve the public safety, health and general welfare; and
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> (8) Further the interest, rights, opportunities and privileges of individuals within the state
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> (b) The prohibitions in this chapter against discrimination because of age in connection with employment and public accommodation shall be limited to individuals who are at least (40) years of age.[58]

Because "the stated purpose and intent of the [THRA] is to provide for execution within Tennessee of the policies embodied in the federal anti-discrimination acts," this Court has held that it is appropriate for Tennessee courts to look to federal courts' interpretations of Title VII for guidance in interpreting the THRA and that an analysis of claims under the THRA is the

[58]Tenn. Code Ann. § 4-21-101 (emphasis added).

same as under Title VII of the Federal Civil Rights Act.[59] Furthermore, while this Court is neither bound by nor limited by federal law when interpreting the THRA, it has often adopted the reasoning and conclusions of federal civil rights decisions finding that "the stated purpose behind the enactment of our THRA will be best served by maintaining continuity between our state law and the federal law,"[60] and has only declined to follow such federal decisions where doing so would conflict with the THRA.[61]

Title VII provides, in pertinent part, that "[i]t shall be an unlawful employment practice for an employer to fail or refuse to hire . . . any individual . . . because of such individual's race, color, religion, sex, or national origin" and "to [l]imit, segregate or classify . . . applicants for employment in any way that would deprive or tend to deprive an individual of employment opportunities . . . because of race, creed, color, religion, sex, age or national origin."[62] Similarly, the THRA, using virtually identical language, provides that "[i]t is a discriminatory practice for an employer to fail or refuse to hire . . . any person or otherwise to discriminate against an individual . . . because of such individual's race, creed, color, religion, sex, age or national origin" and to "[l]imit , segregate or classify . . . applicants for employment in any way that

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[59]*Lynch v. City of Jellico*, 205 S.W.3d 384, 398-99 (Tenn. 2006); *Campbell v. Fla. Steel Corp*., 919 S.W.2d 26, 31 (Tenn. 1996); *Wilson v. Rubin*, 104 S.W.3d 39, 48 (Tenn.Ct.App. 2002); *Frazier v. Heritage Federal Bank for Savings*, 955 S.W.3d 633, 636, n.1 (Tenn.Ct.App. 1997).

[60]*Parker v. Warren County Utility District*, 2 S.W.3d 170, 176 (Tenn. 1999) (Court adopted United States Supreme Court's recently articulated standard of vicarious liability in all supervisor sexual harassment cases).

[61]*See Booker v. The Boeing Company*, 188 S.W.3d 639, 647 (Tenn. 2006) (Court declined to adopt United States Supreme Court's holding in *Morgan* with respect to statute of limitations in pay discrimination cases finding that THRA's statute of limitations is fundamentally different that Title VII's statute of limitations).

[62]42 U.S.C. § 2000e-2(a) (1994).

would deprive or tend to deprive an individual of employment opportunities . . . because of race, creed, color, religion, sex, age or national origin."[63]

The legislative history of Title VII reveals that the statute's purpose was "to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion or national origin."[64] The United States Supreme Court has held that one of Congress' objectives in enacting Title VII was "to achieve equality of employment opportunities.. . ."[65] Accordingly, federal courts have held that there must be some connection with an employment relationship for Title VII's protections to apply.[66] Thus, while Title VII (as well as the THRA) prohibits discrimination against "any individual" with respect to that individual's application for employment, the federal courts have long concluded that Title VII is directed at, and only protects, employees and potential employees.[67] As one federal court has noted:

> [T]his limitation is necessary to further Congress' intent in enacting Title VII. 'Title VII does not presume to obliterate all manner of inequity.' *Keyes v. Secretary of the Navy*, 853 F.2d 1016, 1026 (1st Cir. 1988). Instead, Congress intended to limit the scope of the Act to specific employment relationships; thus, the statute provides relief only against "employers" as defined under

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[63]Tenn. Code Ann. § 4-21-401(a).

[64]*Lutcher v. Musicians Union Local 47*, 633 F.2d 880, 883 (9th Cir. 1980) (quoting H.R.Rep. No. 914, 88th Cong., 2d Sess., repringed in 1964 U.S. Code Cong. & Ad. News, pp. 2355, 2391, 2401).

[65]*Griggs v. Duke Power Co.*, 401 U.S. 424, 429, 91 S.Ct. 849, 28 L.Ed.2s 158 (1971).

[66]*Adcock v. Chrysler Corporation*, 166 F.3d 1290, 1292 (9th Cir. 1999).

[67]*See Shah v. Deaconess Hospital*, 355 F.3d 496, 499 (6th Cir. 2004) (general rule is that federal employment discrimination statutes protect employees); *See also Serapion v. Martinez*, 119 F.3d 982, 985 (1st Cir. 1997); *Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 113 (2nd Cir. 2000); *McClure v. Salvation Army*, 460 F.2d 553, 556 (5th Cir. 1972); *Alexander v. Rush N. Shore Med. Ctr.*, 101 F.3d 487, 491 (7th Cir. 1996); *Adcock*, 166 F.3d at 1292; *Llampallas v. Mini-Circuits, Lab, Inc.*, 163 F.3d 1236, 1242-43 (11th Cir. 1998).

> the statute. We can assume that Congress also meant to limit the pool of potential plaintiffs under Title VII; otherwise, any person could sue an "employer" under the statute regardless of whether she actually have an employment relationship with that employer. Hence, courts have almost universally held that the scope of the term "any individual" is limited to employees.[68]

A similar limitation on the class of potential plaintiffs under the THRA is also necessary to further the General Assembly's express intent in enacting the THRA, *i.e.*, primarily to provide for execution within Tennessee of the policies embodied in the federal anti-discrimination acts, but also to assure that Tennessee has appropriate legislation prohibiting discrimination in employment so as to justify deferral of cases by the EEOC and to safeguard all individuals within the state from discrimination in connection with employment. Moreover, these stated purposes behind the enactment of the THRA would clearly best be served by maintaining continuity between our state and federal law, particularly given that the relevant language in both Title VII and the THRA is virtually identical. Thus, in order for the employment discrimination protections of the THRA to apply to Mr. Lewis, he first must establish that an employment relationship (or in this case, potential employment relationship) exists between the Governor and appointees to the Tennessee Supreme Court.

In order for an employment relationship to exist, there must be an employer and an employee. For purposes of the THRA, "employer" is defined as "the state, or any political or civil subdivision thereof, and persons employing eight (8) or more persons within the state, or any person acting as an agent of any employer, directly or indirectly."[69] However, the term "employee" is not defined under the THRA. "Employee" is defined in Title VII in general as

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[68] *Llampallas*, 163 F.3d at 1243.

[69] Tenn. Code Ann. § 4-21-102(4).

"an individual employed by an employer," with certain individuals excluded, including elected state officials, personal staff of elected state officials, appointees by elected state officials on the policy making level and immediate advisors to elected state officials who advise those officials on the exercise of the powers of the office.[70] Because the THRA is to be construed and applied consistent with Title VII [of the Civil Rights Act of 1964], the trial court found that it was appropriate to adopt this definition of "employee", which excludes elected state officials and appointees at the policy making level, thereby making the THRA inapplicable to this case.

Moreover, even if it were appropriate to ignore Title VII in interpreting the scope of the THRA's protections, Lewis' claim under the THRA should be rejected, because an appointee to the Tennessee Supreme Court under the Tennessee Plan is simply not an employee under either federal or state law.

Although "employee" is defined in Title VII in general terms, the United States Supreme Court has held that such definition is a mere "nominal definition" that is completely circular and explains nothing.[71] That Court has recognized that such Congressional silence often reflects an expectation that courts will look to the common law to fill gaps in statutory text, particularly when an undefined term has a settled meaning at common law.[72] Thus, the Supreme Court has held that "when Congress has used the term employee without defining it, we have concluded that Congress intended to describe the conventional master-servant relationship as understood by

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[70]42 U.S.C. § 2000e(f).

[71]*Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323, 112 S.Ct. 1344, 117 L.Ed.2d 581 (1991).

[72]*Id*. at 324-25, 112 S.Ct. 1344.

common-law agency doctrine."[73] In accord with this holding, federal courts, as well as the EEOC, have applied the common-law agency doctrine to determine whether "any individual" is an employee for purposes of Title VII, as well as state anti-discrimination employment laws.[74]

Similarly, this Court has looked to the common law to fill gaps where the statutory text of the THRA is silent. For example, in *Carr v. United Parcel Services*, this Court looked to the common law civil liability theory of "aiding and abetting" to provide a definition for these terms where the THRA was otherwise silent.[75] Thus, application of the common law of agency to determine whether "an individual" is an employee or applicant for employment within the meaning of the THRA is consistent with this Court's previous rulings in interpreting the THRA and the stated purposes of the THRA.

Whether an individual is an employee under the federal common law of agency depends largely on the thirteen factors articulated by the United States Supreme Court in *Reid*. These factors are:

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[73]*Community for Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40, 109 S.Ct. 2166, 104 L.Ed.2d 811 (1989).

[74]*See, e.g., O'Connor v. Davis*, 126 F.3d 112, 115 (2d Cir. 1997) (for purposes of Title VII, decision on whether a worker is an "employee" requires the application of the common law of agency); *Shah*, 355 F.3d at 499 ("Like the Seventh Circuit, we apply the common law agency test to determine whether a hired party is . . . an employee."); *Lambertsen v. Utah Dept. of Corrections*, 79 F.3d 1024, 1028 (10th Cir. 1996) (Court held that skeletal definitions of "employer" and "employee" provided in Title VII should be fleshed out by applying common-law agency principles to the facts and circumstances surrounding the working relationship of the parties.); *Tagare v. Nynex Network Sys. Co.*, 994 F.Supp. 149, 159 (S.D.N.Y. 1997) (New York Human Rights Law only covers "employees" and thus requires application fo common law of agency to determine whether an individual is an "employee"); *Michael Martell v. Alberto Gonzales, Attorney General, Dept. of Justice*, 2006 WL 2462959 (Aug. 15, 2006) ("Before the Commission or agency can consider whether the agency has discriminated against complainant in violation of Title VII, it first must determine whether complainant is an agency employee or applicant for employment within the meaning of Section 717(a) of Title VII of the Civil Rights Act of 1964. The Commission has applied the common law of agency to determine whether complainant is an agency employee under Title VII.").

[75]955 S.W.2d 832, 836 (Tenn. 1997).

> [1] the hiring party's right to control the manner and means by which the product is accomplished . . . [;] [2] the skill required; [3] the source of the instrumentalities and tools; [4] the location of the work; [5] the duration of the relationship between the parties; [6] whether the hiring party has the right to assign additional projects to the hired party; [7] the extent of the hired party's discretion over when and how long to work; [8] the method of payment[[9] the hired party's role in hiring and paying assistants; [10] whether the work is party of the regular business of the hiring party; [11] whether the hiring party is in business; [12] the provision of employee benefits; and [13] the tax treatment of the hired party.[76]

In balancing these factors, a court should disregard those factors that, in light of the facts of a particular case, are irrelevant or of "indeterminate" weight, *i.e.*, those factors that are essentially in equipoise and thus do not meaningfully cut in favor of either conclusion.[77]

This Court has held that in determining whether a relationship is that of employer/employee, the following factors are to be considered:

> (1) right to control the conduct of work; (2) right of termination; (3) method of payment; (4) whether alleged employee furnishes his own helpers; (5) whether alleged employee furnishes his own tools; and (6) whether one is doing "work for another."[78]

Both this Court and the United States Supreme Court have held that while no single factor is dispositive, the "greatest emphasis" should be placed on the first factor — that is, on the extent to which the hiring party controls the "manner and means" by which the worker completes his or

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[76]*Reid*, 490 U.S. at 751-52, 109 S.Ct. 2166 (footnotes omitted).

[77]*Eisenberg v. Advance Relocation & Storage, Inc.*, 237 F.3d 111, 114 (2d Cir. 2000).

[78]*Slaughter v. Duck River Electric Membership Corp*., 102 S.W.3d 612, 619 (Tenn.Ct.App.), *p.t.a. denied* (2002). Although this case was brought under the Worker's Compensation Act, the basis of liability under that Act, just as with the THRA is the employer/employee relationship and, therefore, this Court's articulation of the factors to consider in determining whether such a relationship exists is also applicable here.

her assigned tasks.[79] The reasoning for the added weight to the first factor is that, under the common law of agency, "an employer-employee relationship exists if the purported employer controls or has the right to control both the result to be accomplished and the 'manner and means' by which the purposed employee brings about that result."[80]

Applying the factors articulated by this Court and the United States Supreme Court to this case, and in particular the control test, it is readily apparent that individuals appointed by the Governor to fill vacancies on the Tennessee Supreme Court under the Tennessee Plan are not employees under the common law of agency, and accordingly, are not employees for purposes of the THRA. While the Governor has the power to appoint an individual to this Court, he is limited in his selection of individuals by operation of the statutory provisions of the Tennessee Plan.[81] Furthermore, Article VI, Section 3 of the Tennessee Constitution states in pertinent part that "***[t]he Judges of the Supreme Court shall be elected by the qualified voters of the State***." (Emphasis added). Thus, pursuant to this constitutional provision, to the extent that Judges of the Supreme Court are "employed," it is the electorate of this state that employs them and to whom they are answerable, not the Governor.

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[79]*Id. See also Frankel v. Bally, Inc.*, 987 F.2d 86, 90 (2d Cir. 1993) (noting that "under the common law agency test" outlined in *Reid*, the "greatest emphasis" is placed "on the hiring party's right to control the manner and means by which the work is accomplished.").

[80]*Eisenberg*, 237 F.3d at 114-115 (citing among others, *Hilton Int'l Co. v. NLRB*, 690 F.2d 318, 320 (2d Cir. 1982); *Railroad Co. v. Hanning*, 82 U.S. (15 Wall) 649, 657-58, 21 L.Ed.220 (1872) (collecting cases and authorities that apply this "control" rule); *Performing Right Soc'y, Ltd. v. Mitchell and Booker, Ltd.*, [1924] 1 K.B. 762 (collecting 19th and early 20th centry English cases that apply the rule and treatises that describe it); Restatement (Second) of Agency § 220(1) cmt. D (1958) (stating that "control or right to control the physical conduct of the person giving service is important and in many situations is determinative" of whether that person is an employee). *See also Adcock*, 166 F.3d at 1292 ("Primary factor in determining whether a relationship is one of employment is the extent of the employer's right to control the means and manner of the worker's performance.").

[81]*See* Tenn. Code Ann. § 17-4-112(a).

Moreover, the Governor simply has no power to direct, promote, demote, fire or otherwise exercise any control over the Justices or the manner and means by which they perform their judicial duties . For example, Art. VI, § 6 of the Tennessee Constitution provides that judges may only be removed from office by a concurrent vote of both Houses of the General Assembly, with two-thirds of the members of each House concurring in such vote. Art. VI, § 13 authorizes the Judges of the Supreme Court to appoint their own clerks. Furthermore, while the State does provide a salary and other benefits to the Judges, the framers of the Tennessee Constitution specifically provided that such compensation is to be fixed by law in order to give the Justices independence in the discharge of their duties.[82] The only role assigned by law to the Governor is to fill vacancies on the Supreme Court on a temporary basis with the assistance of the Judicial Selection Commission pursuant to the provisions of the Tennessee Plan, until such time as an election can be held in accordance with the requirements of the Tennessee Constitution.[83]

Thus, missing from the relationship between the Governor and appointees to the Supreme Court is the most necessary and important element in an employment relationship: the right to control. Accordingly, such appointees and any nominees for appointment are not employees, and thus, the trial court was correct in finding that the THRA does not apply to gubernatorial appointments to fill vacancies on the Tennessee Supreme Court under the Tennessee Plan.

Admittedly, the issue of whether appointees and potential appointees to the Supreme Court are "employees" for purposes of the THRA has not previously been addressed by this

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[82]*See* Art. VI, § 7, Tenn. State Constitution. *See also State ex rel. Webb v. Brown*, 132 Tenn. 685, 179 S.W.321 (1915).

[83]*See* Art. VII, § 5, Tenn. State Constitution.

Court. However, the issue was squarely addressed by the Texas Court of Appeals in *Thompson v. City of Austin* .[84] In that case, two municipal court judges brought suit under the Texas Commission on Human Rights Act (TCHRA) against the City of Austin, alleging that the City Counsel had discriminated against them when it did not reappoint them as municipal judges. The TCHRA contains a provision similar to the THRA, and provides that:

> [a]n employer commits an unlawful employment practice if because of race, color, disability, religion, sex, national origin, or age the employer: (1) fails or refuses to hire an individual, discharges an individual, or discriminates in any other manner against an individual in connection with compensation or the terms, conditions or privileges or employment.[85]

Applying the common law of agency, the court found that, while the City Council had the authority to appoint the judges, it lacked the right to control their judicial functions and, therefore, the judges were not employees for purposes of the TCHRA, but instead, were public officers entrusted with independent and sovereign powers under the Texas Constitution.

> Article II of the Texas Constitution divides the sovereign functions of government, creating a legislative branch, an executive branch, and a judicial branch, each with its own exclusive powers. Tex. Const., art. II, § 1. Historically, the judiciary has been privileged with a sacred independence necessary to maintain the impartiality required to determine the law. A judge must be independent from the outside influence of the other branches of government. Thus, the very nature of the office demands that a municipal judge be independent of the Council in exercising this sovereign power.
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> Entrusted with independent and sovereign powers, judges are public officers and public officers cannot be employees. 'The determining factor which distinguishes a public officer from a employee is whether any sovereign function of the government is

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[84] 979 S.W.2d 676 (Tx.Ct.App. 1998)

[85] Tex. Lab.Code Ann. § 21.051 (West 1996).

> conferred upon the individual to be exercised by him for the benefit of the public largely independent of the control of others.
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> * * *
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> The Council's lack of control results naturally from the separation of powers doctrine and sovereign nature of both the executive and judiciary branches. The Council, which has been endowed with executive and administrative powers, does not exercise control over the independent municipal court; the Council cannot control or influence the decisions of the municipal judge.[86]

Similarly, the Tennessee Constitution divides the sovereign functions of our government, creating a legislative branch, an executive branch, and a judicial branch, each with its own exclusive powers.[87] The Governor's lack of control over Supreme Court appointees results naturally from the separation of powers doctrine and the sovereign nature of both the executive and judiciary branches. Accordingly, a more accurate interpretation of our state constitution and laws adopted in accordance therewith reflects that appointees to the Supreme Court are not employees hired by the Governor, but are constitutional officers of this State elected by and answerable only to the electorate of this State. Accordingly, the trial court correctly held that the THRA is simply not applicable to this case.

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[86] *Id*. at 682-83. The court also held that, even if the municipal judges were employees, it would not apply the TCHRA to their situation as it would violate the separation of powers doctrine, noting that under the City Charter and Texas Constitution, the Council enjoyed discretionary power to appoint and no course for review of this decision was provided. Accordingly, the court held that the only check on the Council in this context rests with the electorate and not with any court. *Id*. at 683.

[87] Art. II, §§ 1 and 2, Tenn. State Constitution.

III. The Trial Court Correctly Found That The Intervenors Failed To State A Cause Of Action That The Governor's Rejection of the First Panel Of Nominees Violated The Equal Protection Clause of the United States Constitution.

The trial court dismissed Intervenor Lewis's claim that the Governor's rejection of the first panel violated the Equal Protection Clause of the Fourteenth Amendment, finding that Lewis had failed to state a claim based on the face of the pleadings. The court also found that the Intervenors' had failed to provide any authority that would authorize the court even to review the Governor's exercise of his discretion in making appointments to the Tennessee Supreme Court, including the rejection of a panel of nominees.

On appeal, Mr. Lewis argues that the trial court either disregarded or misapprehended precedents squarely on point and cites to the cases of *Bakke*, *Grutter* and *Gratz*. However, those are all cases striking down the admissions programs of certain public educational institutions that either specifically involved quotas,[88] or that added points to the admission scores of minority applicants.[89] This is not a case dealing with admissions to public educational institutions, however. This is a case involving the exercise of discretionary authority given by the legislature to the chief executive officer of a state to appoint constitutional officers, officers that are elected by and answerable only to the electorate of this State. Thus, while the cases cited by Mr. Lewis might be informative in cases dealing with the constitutionality of affirmative action plans of a public educational institution or in government contracting, they simply provide no guidance concerning the fundamental issue of whether gubernatorial appointments to the Tennessee Supreme Court under the Tennessee Plan may, consistent with the Equal Protection Clause, take

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[88] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[89] *Gratz v. Bollinger*, 539 U.S. 244 (2003).

into account factors of racial and gender diversity. Mr. Lewis does not cite to any case — nor has counsel for the Governor been able to find any case — where a federal or state court has held that the federal constitution grants courts the authority to exercise judicial oversight over discretionary appointments by the Governor of a state to a constitutional office such as Justice of a state supreme court.

The United States Supreme Court has recognized that such cases are different and that discretionary appointment challenges, such as the one raised by Mr. Lewis, require a more circumspect approach. In *Mayor of City of Philadelphia v. Educational Equality League*, the Supreme Court was presented with an equal protection challenge to Philadelphia's system for appointment of members of the Board of Education, a scheme that resembles the Tennessee Plan. An Educational Nominating Panel (made up partly of appointees by the Mayor) would certify a list of three nominees for appointment to the Board of Education.[90] The Mayor would then have the option of rejecting the nominees and asking for another list of three nominees.[91] The suit was brought by African-American members of the community alleging that the Mayor violated the Equal Protection Clause by discriminating against African-Americans when appointing members of the Educational Nominating Panel, which in turn, had an adverse disparate impact on the African-American population of the Board of Education.[92] The Court observed:

> [T]o the degree that the principles cited by the Mayor reflect concern that judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency, they are in point. There are also

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[90]*Id.* at 606-07; 1326-27.

[91]*Id.* at 607; 1327.

[92]*Id.* at 610; 1328.

> delicate issues of federal-state relationships underlying this case. The federalism questions are made particularly complex by the interplay of the Equal Protection Clause of the Fourteenth Amendment, with its special regard for the status of the rights of minority groups and for the role of the Federal Government in protecting those rights. . . . [A]s recently as in *Carter v. Jury Comm'n of Greene County*, . . . [we] recognized "the problems that would be involved in a federal court's ordering the Governor of a State to exercise his discretion in a particular way . . .."[93]

While this action has been brought in state court, the problems involved in a state court ordering the Governor to exercise his discretion in a particular way are no less significant in light of the well recognized separation of powers doctrine in Tennessee, as well as the Legislature's carefully crafted system of checks and balances within the Tennessee Plan.

Furthermore, as the Chancellor correctly determined, even if discretionary executive appointments to fill vacancies on the federal and state appellate courts are regulated by the Equal Protection Clause in some fashion, the undisputed facts of this case do not make out a *prima facie* showing that Mr. Lewis was discriminated against on account of his race. To make out a violation of the Equal Protection Clause against a public employer [94] in connection with an employment decision, a plaintiff must plead and prove that the employer made the decision with discriminatory purpose or intent.[95] A plaintiff must do more than "just introduce evidence of

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[93]*Mayor v. City of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615, 94 S.Ct. 1323, 1330-31, 309 L.Ed.2d 630, 641-41 (1974) (quoting *Carter v. Jury Commission of Greene County*, 396 U.S. 320, 90 S.Ct. 518, 24 L.Ed.2d 549 (1970)). *See also James v. Wallace*, 533 F.2d 963, 965 (5th Cir. 1976). These cases involved the discretionary appointment of certain officials by a high-ranking elected official and challenges to those appointments by minorities.

[94]The Sixth Circuit has established a separate standard for Equal Protection claims brought against a public employer than those against a private employer. *See Weberg v. Franks*, 229 F.3d 514, 522 (6th Cir. 2000).

[95]*See Weberg*, 229 F.3d at 522 (citing *Boger v. Wayne County*, 950 F.2d 316, 324-25 (6th Cir. 1991)). This further distinguishes *Bakke*, *Grutter*, and *Gratz* from the case at bar. In each of those cases, there was an established policy favoring admission of minorities. *See Gratz*, 539 U.S. 253-54; *Grutter*, 539 U.S. at 314-15; *Bakke*, 438 U.S. at 270. These policies were direct evidence of racial classifications and discriminatory intent. Here, there is no established policy, and as explained futher herein, the evidence presented to show discriminatory intent is

discriminatory intent and suggest that 'such intent could have played a role in an adverse employment decision. Rather, a plaintiff is required to demonstrate that the adverse employment decision would not have been made but for [his or her race].'"[96] Moreover, when as here the Intervenors seek to demonstrate by circumstantial evidence that a public employer has engaged in "reverse discrimination," they must show that the background circumstances support the suspicion that the defendant is the unusual employer who discriminates against the majority.[97]

Contrary to Intervenor Lewis' contention, the Governor's letter rejecting the first panel does not support any inference that Lewis would have been appointed to this Court but for his race. Rather, as the Chancellor observed, "[t]he Governor makes it clear in his letter . . . that his reason for rejecting the first panel was because Chancellor Dinkins withdrew."[98] Although the letter also observed that Chancellor Dinkins' withdrawal meant that the Governor no longer had an opportunity to consider diversity as a factor in making his selection, the letter does not even indirectly intimate that either Mr. Gordon or Mr. Lewis (the remaining two nominees on the panel) would have been favorably considered for appointment had they been members of a different race. Nor does the letter suggest that the Governor would not consider appointing a Caucasian applicant to the position, assuming Caucasion nominees "who meet the highest professional and personal standards" were certified to him as members of a second panel.[99] In

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insufficient as a matter of law.

[96]*Boger v. Wayne County*, 950 F.2d 316, 325 (6th Cir. 1991) (internal citations omitted).

[97]*See Boger*, 950 F.2d at 325; *Weberg*, 229 F.3d at n. 8.

[98]TR Vol. II at 245.

[99]*See* TR Vol. I at 13.

sum, the Governor's stated desire to have the *option* of considering "qualified minority candidates" for appointment simply does not equate to a decision not to consider Caucasion candidates for the position on account of their race. Likewise, neither intervenor has cited any "background circumstances" that might suggest that this Governor systematically discriminates against Caucasian nominees in making his judicial appointments. Indeed, the Governor's last two appointments to this Court have been persons of the majority race.

Finally, even if the Governor's exercise of his discretionary appointment authority does somehow implicate the Equal Protection Clause in this instance (an assertion that the Governor does not concede), Mr. Lewis' claim still must fail. The Supreme Court has recognized that not every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decision maker for the use of race in that particular context.[100] Here, the importance and sincerity of the Governor's stated desire to consider diversity as one of several factors in appointing a Justice cannot be doubted, particularly in light of the history of the Tennessee Supreme Court. Indeed, this Court can certainly take judicial notice of the fact that in its history there have only been two Justices of African American descent.

This Court can further take judicial notice of the fact that the population of this state is racially and ethnically diverse. The United States Supreme Court has recognized that "[i]n order to cultivate a set of leaders with legitimacy in the eyes of the citizenry, it is necessary that the path to leadership be visibly open to talented and qualified individuals of every race and

[100]*Grutter v. Bollinger*, 539 U.S. 306, 327, 123 S.Ct. 2325, 2338, 156 L.Ed.2d (2003).

ethnicity."[101] Furthermore, all members of our heterogenous society must have confidence in the openness and integrity of our legal system and in particular, in the highest court of this state. Just as in the *Grutter* case, the Governor's reason for requesting qualified minority candidates was not based on "any belief that minority [candidates] always (or even consistently) express some characteristic minority viewpoint on any issue." Rather, it was based upon his recognition that for the past thirteen years the State has been well-served by a Supreme Court that reflects the diversity of Tennessee and his wholly unexceptional view that diveristy should at least be considered in selecting judges who meet the highest professional and personal standards.[102]

Additionally, contrary to Mr. Lewis' assertions, the Governor's action in rejecting the first panel is "narrowly tailored," as it is the *only* option available to the Governor under the Tennessee Plan to obtain a panel that affords him the breadth of choices he desires, including the opportunity to consider diversity. The legal consequences of the Governor's rejection of the first panel — that Messrs. Gordon and Lewis were rendered ineligible for further consideration — was the result of the operation of the Tennessee Plan, specifically Tenn. Code Ann. § 17-4-112(a).[103] That consequence cannot be attributed to any racially discriminatory animus aimed against the intervenors specifically, or against white people generally.

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[101] *Id*. at 332, 123 S.Ct. at 2341.

[102] *See* TR Vol. 1 at 13.

[103] Tenn. Code Ann. § 17-4-112(a) provides that in the event the Governor rejects a first panel of nominees to fill a vacancy, the Judicial Selection Commission is required to certify one "other" panel of nominees from which the Governor must make an appointment. The Chancellor ruled, consistent with the position of the Governor and Attorney General, that this provision operates to disqualify those whose names appeared on a rejected first panel from certification as members of a second panel of nominees. As we have previously noted, *see* p. 14, n. 45, *supra*, neither Lewis nor Gordon has challenged that ruling in this Court.

Accordingly, to the extent that the Equal Protection Clause is even implicated by the Governor's actions and this Court determines that it is appropriate to exercise judicial oversight over gubernatorial appointments to this Court, Mr. Lewis has still failed to establish a violation of the Equal Protection Clause.

CONCLUSION

For these reasons, the decision of the trial court should be affirmed by this Court.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief has been served by the means indicated this 19th day of January, 2007, to:

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